Office-Supreme Court, U.S.
FILED
JUL 18 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1076

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

TRANSCONTINENTAL GAS PIPELINE CORPORATION,
Appellant

V.

THE STATE OIL AND GAS BOARD OF MISSISSIPPI
AND
COASTAL EXPLORATION, INC., et al.,
Appellees

ON APPEAL FROM THE SUPREME COURT
OF MISSISSIPPI

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant Attorney General

LARRY J. LAURENT
Assistant Attorney General
Chief, Energy Division

MANUEL RIOS*
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

Attorneys for
The State of Texas

*Counsel of Record

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. The Preemption Question: Are State ratable-take orders for deregulated "deep high-cost natural gas" under §107 of the Natural Gas Policy Act of 1978 (NGPA) preempted by federal authority?

2. The Commerce Clause Question: Does the ratable take order of the Mississippi Oil and Gas Board violate the Commerce Clause of the United States Constitution?

TABLE OF CONTENTS

PAGE

Table of Authorities iii

Interest of Amicus Curiae, The State of Texas iii

Summary of Argument 1

Argument:

I. State Ratable—Take Orders for Section 107 Gas Sold in Interstate Commerce Are Not Preempted by Federal Authority 2

A. The Passage of the NGPA Renders This Court's Decision in *Northern Natural* not Applicable to the Fact Situation in the Present Case 3

B. The NGPA Does not Preempt State Orders Requiring Interstate Pipelines to Ratably Take Deregulated Gas 5

C. The Deregulation of "High Cost" Gas Does Not Prohibit State Orders to Take Ratably 8

D. State Orders, Like Those Issued by the Railroad Commission of Texas, That Require Interstate Pipelines to Take Ratable are Conservation Measures and Serve the Ends of Federal Law 8

II. The Commerce Clause Question Should be the Controlling Issue in This Case 11

Conclusion 12

TABLE OF AUTHORITIES

CASES	PAGE
Arkansas Electric Cooperative Corp. v. Arkansas Public Commission, 103 S. Ct. 1095 (1983)	8
Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W.2d 934 (1935)	9
Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950)	3,8,11,12
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981)	5
DeCanas v. Bica, 424 U.S. 351 (1976)	5
Exxon Corp. v. Eagerton, 103 S. Ct. 2296 (1983)	5
Exxon Corp. v. Maryland, 437 U.S. 117 (1978)	5
Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	5
FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944)	6
Northern Natural Gas Co. v. State Corporation of Kansas, 372 U.S. 84, reh'g denied, 372 U.S. 1011 (1963)	2,4,6,12
Ohio Oil Co. v. State of Indiana, 177 U.S. 190 (1900)	11
Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission, 103 S. Ct. 1713 (1983)	5,11
Palmer v. Massachusetts, 308 U.S. 70 (1939)	5

Railroad Commission v. Aluminum Co. of American, 380 S.W. 2d 599 (Tex. 1964) 11

Railroad Commission v. Mackhank Petroleum Co., 144 Tex. 393, 190 S.W. 2d 802 (1945) 10

Railroad Commission v. Shell Oil Co., 380 S.W. 2d 556 (Tex. 1964) 9

Schwartz v. Texas, 344 U.S. 199 (1952) 5

Texaco, Inc. v. Railroad Commission, 583 S.W. 2d 307 (Tex. 1979) 9,10

STATUTORY PROVISIONS

15 U.S.C. §717(b) (1976) 4
15 U.S.C. §717(c) (1976) 6
15 U.S.C. §717c(e) (1976) 4
15 U.S.C. §717f(b) (1976) 4
15 U.S.C. §717f(c) (1976 & Supp. 1985) 4
15 U.S.C. §3317(a) (1982) 2,4
15 U.S.C. §3331(b) (1982) 4
15 U.S.C. §3431(a) (1982) 4
15 U.S.C. §3431(a)(1) (1982) 4
15 U.S.C. §3431(a)(1)(B)(i) (1982) 4
15 U.S.C. §3431(c)(2) (1982) 7

TEXAS CONSTITUTIONAL AND STATUTORY PROVISIONS

TEX. CONST. art. XVI, §59(a) 9
TEX. NAT. RES. CODE ANN. § 85.046(9) (Vernon 1978 & Supp. 1984) 10
TEX. NAT. RES. CODE ANN. §§85.121-.125 (Vernon 1978 & Supp. 1984) 10
TEX. NAT. RES. CODE ANN. §85.123 (Vernon 1978) . 10
TEX. NAT. RES. CODE ANN. §85.201 (Vernon 1978) .. 9
TEX. NAT. RES. CODE ANN. §85.202 (b) (Vernon 1978) 9
TEX. NAT. RES. CODE ANN. §86.012(b) (Vernon 1978 & Supp. 1984) 10

16 TEX. ADMIN. CODE §§3.28, 3.29, 3.30, 3.31, & 3.91 (Dec. 1982) 9

OTHER AUTHORITY

Note, *Natural Gas Regulation and vested Property Interest: Ratable Taking, Proration Standards and Fieldwide Civil Liability,* 62 TEX. REV. 691 (1983) 7

Pierce, *Natural Gas Regulation, Deregulation & Contracts,* 68 VA 63, 67 n. 18 (1982) 6

NO. 84-1076

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

TRANSCONTINENTAL GAS PIPELINE CORPORATION,
Appellant

V.

THE STATE OIL AND GAS BOARD OF MISSISSIPPI
AND
COASTAL EXPLORATION, INC., et al.,
Appellees

ON APPEAL FROM THE SUPREME COURT
OF MISSISSIPPI

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The State of Texas is the site of approximately one third of all the oil and gas production in the United States. The Railroad Commission of Texas is the State agency that regulates this production. The Railroad Commission's regulatory scheme for the conservation of oil and gas is complex and has been generations in the making. An essential and necessary part of this scheme of regulation is the ability of the Railroad Commission to require that interstate and intrastate natural gas pipelines take ratably from all the wells in the fields that they serve.

It is in the best interest of the State of Texas and the United States that the Texas regulatory system for the conservation of oil and gas not be weakened. A decision in this case that States cannot require interstate pipelines to take "high cost"

deregulated gas in a ratable manner will seriously damage the Texas conservation system. Such a decision will result in the waste of natural gas.

SUMMARY OF THE ARGUMENT

1. Peemption

Section 107 of the National Gas Policy Act of 1978 (NGPA) deregulates "high cost" gas produced from wells deeper than fifteen thousand feet. 15 U.S.C. §3317(a) (1982). All the natural gas in this case is "high cost" gas under §107 of the NGPA. The Federal Energy Regulatory Commission (FERC) no longer has certificate or abandonment power over the gas in this particular case. Section 107 gas is subject neither to NGPA regulatory controls nor an NGPA price ceiling.

Since FERC no longer has statutory authority to regulate the first sale of §107 gas, this Court's decision in *Northern Natural Gas Co. v. State Corporation Commission of Kansas,* 372 U.S. 84 (1963) does not apply to the present case. The decision in *Northern Natural,* which voided a state ratable take order, was made under the unique facts of the Natural Gas Act of 1938 (NGA). Under the NGA, the Federal Power Commission (now FERC) had exclusive regulatory jurisdiction over an interstate pipelines purchase of natural gas. The NGPA eliminated FERC's regulatory authority over first sales of "high cost" natural gas. The NGPA is a deliberate departure from the "pervasive scheme" of federal regulation that was the basis for the *Northern Natural* decision.

Orders, like those issued by the Railroad Commission of Texas, directing interstate pipelines to take §107 gas in a ratable manner are a vital and necessary part of the Texas conservation system. The locations within a field from which oil and gas is drawn from the ground can increase or decrease recovery. There are certain types of oil wells that will be destroyed if they are ever shut in. If the decision to take the gas from some wells in the field are not made on the basis of sound engineering, but instead are made on the basis of which producers will submit to the contract terms imposed by the pipeline company, then waste will result. Furthermore, if the

owners of oil wells are not allowed access to a pipeline for the transportation of the gas produced in association with their oil, they may attempt to continue producing the oil and flare or vent the gas. This too is a waste of hydrocarbons.

The State of Texas is concerned that in deciding the preemption and Commerce Clause issues this Court will review ratable take orders as actions designed only to protect correlative rights. It is important that this Court understand that ratable take orders are an essential part of the Texas conservation system. A decision that disregards this fact could have devastating consequences on the State's efforts to prevent the waste of oil and gas. Such a decision would be in conflict with the federal policies announced in such statutes as the NGPA and the Connally Act. The greater deference that this Court gives to an exercise of State police powers to promote conservation is required by the facts of this case.

2. Commerce Clause.

The State of Texas believes the preemption question in this docket is eliminated by the changes in federal law wrought by the passage of the NGPA. The Commerce Clause question therefore should be the controlling issue in this case. In *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950), this Court upheld the Oklahoma Common Purchaser Act against a Commerce Clause challenge. This latter statute is similar to the Texas Common Purchaser statute that authorizes the Railroad Commission to issue orders requiring ratable taking. The State of Texas therefore believes that the decisive issue in this case is whether the unique characteristics of the Mississippi scheme of ratable take do or do not violate the Commerce Clause. This honorable Court should hold that the Mississippi ratable take order is not a burden on interstate commerce.

ARGUMENT

I. STATE "RATABLE-TAKE" ORDER FOR SECTION 107 GAS SOLD IN INTERSTATE COMMERCE ARE NOT PREEMPTED BY FEDERAL AUTHORITY

A. The Passage of the NGPA Renders this Court's Decision in *Northern Natural* not Applicable to the Fact Situation in the Present Case

All gas production from the Mississippi fields in the present case was from wells deeper than 15,000 feet and is thus "high cost gas" under §107 of the NGPA. This type of gas is expressly deregulated by statute. 15 U.S.C. §3317(a) (1982). The FERC's jurisdiction over this type of gas, which was found in the NGA, 15 U.S.C. 717(b) (1976), was eliminated by the NGPA. 15 U.S.C. §3431(a)(1) (1982). The FERC has neither certificate nor abandonment power over §107 gas.[1] Section 107 gas is subject neither to NGPA regulatory controls nor an NGPA price ceiling. 15 U.S.C. §§3331(b) (1982), 3431(a)(1)(B)(i).

The FERC argues that, contrary to the view of the courts below, Section 601(a) of the NGPA, 15 U.S.C. §3431(a) (1982), did not undermine *Northern Natural*, or the principles there articulated. (Brief for the U.S. and FERC, p. 11). In *Northern Natural*, this Court invalidated an order of the Kansas State Commission because the NGA has conferred exclusive jurisdiction over the sale and transportation of natural gas in interstate commerce to the FPC (now FERC). *Northern Natural*, 372 U.S. at 92.

As discussed above, FERC no longer has jurisdiction over §107 "high cost" gas. The State of Texas believes that the statutory basis for voiding the state order in *Northern Natural* was shattered by the NGPA and its accompanying deregulation. As a result, the NGA analysis in *Northern Natural* is not applicable to deregulated "high cost" gas under §107 of the NGPA.

---

1. Under the NGA system, a natural gas producer seeking to contract for the interstate sale of gas must apply to the FERC for a certificate of public convenience and necessity authorizing the sale. 15 U.S.C. §717f(c) (1976 & Supp. I 1985). After the certificate is issued the producer must continue to supply the gas to the purchaser and cannot abandon the service without the Commission's express prior approval. 15 U.S.C. §717f(b) (1976). Furthermore, the burden of proof is placed on the pipeline to show the rates being charged are "just and reasonable." 15 U.S.C. §717c(e) (1976).

B. The NGPA Does Not Preempt State Orders Requiring Interstate Pipelines to Ratably Take Deregulate Gas.

Since the NGA is no longer applicable to what is now classified as §107 gas, it is the NGPA that must be examined to determine if the ratable take order of the Mississippi Oil and Gas Board is preempted. A review of this latter statute reveals that there is no express preemption provision in the NGPA. *Exxon Corp. v. Eagerton*, 103 S. Ct. 2296, 2304 (1983).

When construing legislation, this Court "[h]as disfavored inroads by implication on state authority..." *Palmer v. Massachusetts*, 308 U.S. 70, 84 (1939). Only a demonstration that the complete ouster of state power was the clear and manifest purpose of Congress warrants the preemption of state regulatory authority. *DeCanas v. Bica*, 424 U.S. 351, 357 (1976). The conclusion that Congress legislated the ouster of a state statute cannot be made, "[i]n the absence of an unambiguous congressional mandate to that effect." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963). Congressional intent to supersede the exercise of power by the state is not assumed unless there is a clear manifestation of intention to do so. *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952).

In addition, general statement by Congress of national policy do not indicate an intent to preempt all state legislation in the area affected. This rule even applies to state legislation that may have an adverse impact on the announced federal policy. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633 (1981); *Exxon Corp. v. Maryland*, 437 U.S. 117, 133-34 (1978).

Implied preemption can be inferred from a "scheme of federal regulation so pervasive" that "the federal system will be assumed to preclude enforcement of state laws on the same subject." *Pacific Gas and Electric v. State Energy Resources Conservation & Development Commission*, 103 S. Ct. 1713, 1722 (1983). Unlike the NGA, the NGPA does not create a pervasive system of federal regulation. It was the failure of the exclusively federal system of the NGA that led to the creation of the NGPA.

The system of regulation created by the NGPA and overseen by the FERC caused severe market distortions. Low FERC-set prices encouraged producers to forego the interstate market and to enter the more lucrative intrastate market, the latter being exempt from NGA and federal controls. 15 U.S.C. §717(c) (1976). The decline in interstate reserves in the late 1960's was the first indication of an impending gas shortage. Gas demand began to outstrip the discovery of new gas. As result of the lag between declining reserves and inadequate deliverability, the shortage first affected end-use consumers in 1971, when curtailments, or rationing commenced. Pierce, *Natural Gas Regulation, Deregulation, and Contracts,* 68 VA. L. REV. 63, 67 n. 18 (1982).

The primary purpose of the NGA was to protect consumers against exploitation at the hands of natural gas companies. *FPC v. Hope Natural Gas Co.,* 320 U.S. at 611. The heart of this system was the pervasive federal regulatory scheme for the setting of "just and reasonable" rates for all natural gas in interstate commerce. *Id.* at 612. The aim of the NGPA is different. It is to protect consumers by ensuing sufficient gas supplies while at the same time maintaining enough controls to prevent the rapid increases in price that might result from full deregulation.

In its preemption argument, the FERC ignores the changes in Federal policy and law that were made by the passage of the NGPA. The FERC argues that under the NGPA its authority is the same as under the NGA and that it still possesses the power to regulate the "intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States." *Northern Natural,* 372 U.S. at 92 (Brief for the U.S. and FERC. pp. 17-18). Contrary to FERC's position, Congress drastically diminished the role of the FERC in overseeing the price of natural gas moving in interstate commerce. The NGPA expressly eliminated FERC jurisdiction over the first sale of certain types of natural gas, including the deregulated gas at issue in this case.

The FERC also argues that State ratable take orders are preempted because they conflict with the FERC's authority

under 15 U.S.C. §3431(c)(2)(B)(1982) to ensure that a pipeline's pass through of its gas costs is consistent with the rules implementing the incremental pricing provisions of the NGPA. (Brief for the U.S. and FERC. pp. 22-23). Incremental pricing was intended to shift some of the icnreased costs of the partially increased deregulated gas market to industrial users. It was also intended to curb the bidding up of prices on deregulated gas supplies. The FERC offers the following analysis:

> Accordingly an integral part of the incremental pricing system established by Title II of the NGPA is its reliance on market forces to control the wellhead price of high cost gas. The state ratable take rule substitutes state regulation of the free market necessary to make the incremental pricing provision operate as Congress intended.

(Brief for the U.S. and FERC, p. 24)

The Texas system of ratable take does not interface with the free market. Ratable take orders issued by the Texas Railroad Commission do not force interstate pipelines to purchase more Texas natural gas than the pipelines desire nor do such orders attempt to force additional "high cost" gas into interstate commerce. The Texas sytem is, therefore, not in conflict with the FERC's incremental pricing authority.[2]

Indeed the FERC itself cites with approval the statement that state regulatory orders enforcing ratable production in a field at market demand levels (i.e., true market demand proration orders) cannot be manipulated for purposes of economic protectionism. (Brief of the U.S. and FERC, p. 15 n. 13) (citing, Note, *Natural Gas Regulation and Vested Property Interest: Ratable Taking, Proration Standards and Fieldwide Civil Liability,* 62 TEX. L. REV. 691, 722-23 (1983)).

---

2. The State of Texas respectfully refers this Court to the discussion in Coastal Exploration Inc.'s Motion to Dismiss or, In the Alternative, to Affirm the Decision of the Supreme Court of Mississippi, pp. 6-7, regarding the lack of conditions which the Mississippi Oil and Gas Board ratable take order placed on Transcontinental Gas Pipeline Corporation.

Congress replaced the federal scheme of well-head-to-city-gate FERC regulation by a general statutory pattern of well-head prices; it declared much of the remaining FERC interpretive and enforcement authority to be delegatable to state commission; and it consciously ceded to the States a measure of direct control over intrastate well head prices. These are not the characteristics of a federal system that is so pervasive as to warrant a finding the Congress intended to preempt State regulation by implication. This is especially true when the State action is not an attempt at economic regulation but is a valid use of the State's traditional police powers to prevent the waste of natural gas.

C. The Deregulation of "High Cost" Gas Does Not Prohibit State Orders to Take Ratably

In its brief, the FERC cites *Arkansas Electric Cooperative Corp. v. Arkansas Public Commission,* 461 U.S. at 384, for the proposition that the federal decision to forego regulation in an area implies a federal determination that the area be left unregulated and preempts state regulation. (Brief for the U.S. and FERC, pp. 13-14) This form of federal preemption was not intended by the NGPA's deregulation. Congress did not state that wellhead prices of "high cost" gas should be left unregulated by the States. Nor does a review of the NGPA evidence any attempt by Congress to ban ratable take orders.

Ratable take orders to interstate pipelines, like the orders issued by the Railroad Commission of Texas ratable take orders prevent the waste of natural gas and thus protect consumers by requiring the recovery of natural gas in the most efficient manner. This ensures large supplies of gas for consumers. Preemption should not be implied in this instance because, "Insofar as conservation is concerned, the national interest and the interest of producing states may well tend to coincide." *Peerless,* 340 U.S. at 188.

D. State Orders, Like those Issued by the Railroad Commission of Texas, That Require Interstate Pipelines to Take Ratably are Conservation Measures and Serve the Ends of Federal Law

Both the Texas Constitution and the statutes of the State place a mandatory duty on the Railroad Commission of Texas to prevent the waster of oil and gas.[3] The authority to require pipelines to take gas in a ratable manner from all the wells in a gas field is therefore a vital part of the Texas conservation system.[4] If a well owner is denied the right of access to a natural gas pipeline and has to shut in his wells, valuable oil and gas will be drained from beneath his lease. These hydrocarbons will enrich neighbors whose wells have connections to the pipeline. In such a situation, well owners without connections to a pipeline may try to produce the oil and illegally vent or flare the gas.

---

3. In 1917, the people of the State of Texas adopted TEX. CONST. art. XVI, §59(a). This constitutional provision makes the conservation of all natural resources a public right and duty. The Texas Supreme Court held that Article XVI, §59(a) "[d]irects the Legislature to do whatever is necessary for the conservation of natural resources." *Brown v. Humble Oil & Refining Co.*, 126 Tex. 296, 83 S.W. 2d 935, 941 (1935). To comply with the mandate of the Constitution, the Texas Legislature requires that the Railroad Commission "[m]ake and enforce rules and orders for the conservation of oil and gas." TEX. NAT. RES. CODE ANN. §85.201 (Vernon 1978), and, "[d]o *all things necessary* for the conservation of oil and gas and prevention of waster of oil and gas and may adopt other rules and orders *as may be necessary* for those purposes." TEX. NAT. RES. CODE ANN. §85.202(b) (Vernon 1978) (emphasis added). These statutes impose a mandatory duty of the Commission to prevent the waster of oil and gas. *Texaco, Inc. v. Railroad Commission*, 583 S.W. 2d 207, 310 (Tex. 1979); *Railroad Commission v. Shell Oil Co.*, 380 S.W. 2d 556, 559 (Tex. 1964).

4. The legal framework of the Railroad Commission's natural gas propration system is provided by Chapter 85 of the Texas Natural Resources Code, the Oil and Gas Division Statewide Rules 28, 29, 30, and 31, and the Gas Market Demand Rule (16 TAC §§3.28, 3.29, 3.30, 3.31, and 3.91) (Dec. 1982). Chapter 86 of the Natural Resources Code gives the Commission the authority to prorate and regulate daily gas well production to prevent waster and adjust the correlative rights and opportunities of owners of gas to produce and use or sell their gas.

The Texas proration system is an effort to distribute the market demand for gas fairly among various producers in a way that reflects the actual ownership of gas in the reservoir. The production of gas that is allowed by the Commission in any given month is closely tied to the anticipated market demand for the month. The conservation statutes contained in Chapter 85 of the Texas Natural Resources Code give the Railroad Commission the authority to determine the market demand for gas and set the allowable production.

Further, if a reservoir is drained of its natural gas solely on the basis of contract rights then the decision on how the reservoirs should be drained will be made not on sound engineering principles but on the basis of which producers in the field are willing to meet the contracts demands of the pipeline.

There are also certain types of wells that will be destroyed if they are shut in. Oil wells that are capable of flowing on their own, but which have marginal bottom hole pressure, fall within this category. See Marginal Wells, TEX. NAT. RES. CODE ANN. §§85.121-125 (Vernon 1978, Supp. 1984). In these wells, the bottom hole pressure is capable of lifting the fluid and gas in the well column to the surface. If these wells are shut in, the reservoir continues to push fluids into the column so that after a while the marginal bottom hole pressure cannot push the fluids and gas to the top. Oftentimes these marginal wells do not produce enough hydrocarbons to pay for using an artificial lift on the well. The Railroad Commission adjusts its allowables to try to prevent the destruction of such wells. It will order that they continue to flow even when it shuts in an entire field. *Railroad Commission v. Mackhnak Petroleum Co.*, 144 Tex. 393, 190 S.W. 2d 802, 804 (1945).

Such wells have to be shut in if there is not way to transport their gas production from the lease. The wasteful flaring or venting of natural gas is prohibited in Texas. TEX. NAT. RES. CODE ANN. §85.046(9) (Vernon 1978, Supp. 1984) and 86.012(b) (Vernon 1978 & Supp. 1984). If the production in a field is not ratably divided among all the wells in a field, and interstate pipelines are free to take only from wells whose owners have met their terms, then marginal wells may be destroyed. Oil and gas will be wasted. Such actions violate TEX. NAT. RES. CODE ANN. §85.123 (Vernon 1978) and defeat the polices announced in the NGPA.

There are other situation in which the Texas Railroad Commission must adjust the production allowables of specific wells in a field in order to maximize the recovery of hydrocarbons. *Texaco, Inc. v. Railroad Commission*, 583 S.W. 2d 207, 310 (Tex. 1979). Oil and gas reservoirs are not uniform in structure, and the locations from which oil and gas is drawn from the ground can increase or decrease recovery. If interstate

pipelines are permitted to ignore these production orders and take only from the wells whose producers signed contracts with the pipeline, then waste will result and sound engineering principles will be ignored.

As long ago as 1900, this Court held that the States' powers to promote the conservation of oil and gas rests in their police powers. *Ohio Oil Co. v. State of Indiana*, 177 U.S. 190 (1900). The regulation of the production of natural gas is a valid exercise of the police power of the State of Texas. *Railroad Commission v. Aluminum Co. of America*, 380 S.W. 2d 599, 602 (Tex. 1964). When Congress legislates in a field in which the statutes have traditionally exercised their police powers this Court starts. "[w]ith the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Pacific Gas and Electric*, 103 S. Ct. at 1723 (quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 318, 230 (1947). There is no clear and manifest preemption of State ratable take orders. Such orders further the goals of federal law. These orders ensure greater supplies of natural gas and thus serve the policy interest of the NGPA.

The State of Texas wishes to impress upon this Court that the State's ratable take orders serve the national interest and are not intended to further parochial interests or discriminate against other States. Nor are these orders an attempt to indirectly regulate wellhead sales. Instead, Texas is using a historic police power to prevent the waste of natural gas. The NGPA was not intended to preempt this exercise of the States' historic police powers.

II. THE COMMERCE CLAUSE QUESTION SHOULD BE THE CONTROLLING ISSUE IN THE CASE.

This Court's decision in *Peerless* illustrates that State order requiring interstate pipelines to take ratably are not necessarily invalidated by the Commerce Clause. Since the preemption question is disposed of by the changes in federal law wrought by the passage of the NGPA, the controlling issue in this case should be whether Mississippi's order is invalidated by the Commerce Clause.

This Court has previously held that a state ratable take order issued to an interstate gas purchaser does not violate the Commerce Clause. *Peerless,* supra. The subsequent decision in *Northern Natural* invalidated a state order not because it was an impermissible burden on commerce but because the order was preempted by the NGA. This Court pointed out in *Northern Natural* that as to constitutional challenges the *Peerless* decision was not overruled. *Northern Natural,* 372, U.S. at 91, n. 10.

The State of Texas believes that the explanation of Mississippi's particular system of ratable take is best left to Mississippi. However, the State of Texas does agree that the protection of correlative rights (like the prevention of waste and drainage) is a legitimate local interest that should be protected by a State's police powers. Further, the appellee Transco has not demonstrated an excessive burden in interstate commerce. Instead, the only burden is on Transco itself as a result of gas purchase contracts which Transco freely entered into. In any case Texas believes that its own system of ratable take, which is similar to the Oklahoma Common Purchaser Act that was upheld in *Peerless,* does not violate the Commerce Clause. When deciding the present case now before it, Texas request his Court to consider that State ratable take orders are valid exercises of State police powers.

CONCLUSION

For the foregoing reasons, the State of Texas as amicus curiae respectuflly submits that the decison of the Mississippi Supreme Court is sound in policy as well as law. We respectfully urge this Court to affirm the decision below.

Respectfully,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

LARRY J. LAURENT
Assistant Attorney General
Chief, Energy Division

MANUEL RIOS*
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 475-1101

Attorneys for
The State of Texas

**Counsel of Record*